Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

MARY ALMAND,

Petitioner,

vs.

DEKALB COUNTY, GEORGIA, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Must a court's determination of whether an action was taken under color of state law be made in light of the totality of the circumstances.

2. Is the question of whether an action was taken under color of state law always a pure question of law or can it be a mixed question of law and fact.

3. Whether a defendant's admission in his Answer that he acted under color of state law is binding.

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appear in the caption of the case. There is no parent or subsidiary company of any party to be listed.

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Petitioner, Mary Almand, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 103 F.3d 1510 (11th Cir. 1997) and is reproduced in the Appendix filed herewith at App. A, 1a. The unreported opinion of the district court in this case is reproduced in the Appendix filed herewith at App. B, 17a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on January 24, 1997. Almand's Suggestion of Rehearing En Banc was denied May 7, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The provisions of 42 U.S.C. § 1983 are set forth below:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In July 1990, Mary Almand discovered that her daughter was missing. In an attempt to locate her daughter, Almand posted and passed out fliers near her home. While distributing fliers at a convenience store, Almand met Defendant Floyd Bryant, a Dekalb County police officer. Bryant approached Almand in the parking lot of the store and questioned her about the fliers. Bryant was not in uniform at the time he approached Almand, and she responded only that she was looking for someone. Bryant then showed her his badge, revealing his identity as a Dekalb County police officer. Once Almand was aware of Bryant's position as a police officer, she revealed that she was searching for her missing daughter. At that time, Bryant offered his assistance as a police officer in finding Almand's daughter but only on the condition that Almand would go out on a date with him. Almand refused to go out with Bryant, but asked for his help in locating her daughter. Bryant took Almand's phone number so that he could contact her if he obtained information about her daughter. Subsequently, Almand and Bryant spoke on the phone several times about Almand's daughter.

Approximately one week after her disappearance, Almand's daughter was located and returned home with the assistance of the Atlanta Police Department. When her daughter returned home, Almand learned that she had been taken to a hotel where she was held against her will and raped by two men. The Atlanta Police Department later told Almand that things like those which had happened to her daughter occur often in the area and that nothing could probably be done to apprehend those responsible for her daughter's abduction and rape.

On the day Almand's daughter returned home, Almand told Bryant what had happened to her daughter. Bryant indicated that he had an idea where Almand's daughter had been and who had raped her. Approximately one week after her daughter's return, Bryant phoned Almand and offered to reveal important information about the rape of her daughter. He indicated this information was so sensitive that its revelation could cost him his job. Bryant told Almand that he would disclose this information to her if she would agree to have sex with him. Initially Almand agreed, but later declined when Bryant arrived at her apartment.

Despite Almand's rejection of his sexual demands, Bryant said that he would continue to help Almand investigate her daughter's rape. Bryant then conditioned his assistance on Almand's helping him to expose a "dirty cop" in the Dekalb County Police Department where Bryant was employed. Bryant told Almand that he believed this officer to be connected to the people who raped Almand's daughter. Almand followed Bryant's instructions in his attempt to expose this officer.

In August 1990, Bryant came to Almand's apartment. He was breathing hard and sweating. He asked to come in to talk with her on urgent matters about her daughter. Almand unlocked the door and allowed him to enter the apartment. Once inside, Bryant accused Almand of leading him on and began making sexual advances. Almand asked Bryant to leave. Bryant initially went out the door, but before Almand could retrieve the key and relock the door Bryant reentered the apartment. Upon reentering the apartment, Bryant struggled with and raped Almand.

Almand filed her original complaint against Defendants DeKalb County, Officer Bryant, and several other individually named defendants in August 1992. Subsequently, Almand amended her complaint which, as amended, included a claim

under 42 U.S.C. § 1983 for the violation of her constitutional rights protected by the Fourth and Fourteenth Amendments. Each defendant filed a separate Answer to both of Almand's Complaints.

Subsequently, all defendants moved for summary judgment. In its May 30, 1995 Order, the United States District Court for the Northern District of Georgia denied Officer Bryant's motion for summary judgment based on his qualified immunity. Bryant appealed the denial of qualified immunity to the Eleventh Circuit Court of Appeals.

On January 24, 1997, in a split decision, the Eleventh Circuit overturned the district court's denial of qualified immunity to Bryant, finding that he was not acting under of color of state law when he raped Almand. The court found that once Almand closed the door behind Bryant and he reentered with force, his status as a police officer had no bearing on his behavior. The court stated that its color-of-state-law conclusion required line drawing, and it "dr[ew] the line at the front door of Almand's apartment." 103 F.3d at 1515 (App. A, 11a).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ in order to resolve a split among the federal circuit courts of appeals on two important questions concerning whether an action is taken under color of state law. This Court held in *West v. Atkins*, that a defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." 487 U.S. 42, 49, 108 S. Ct. 2250, 2255 (1988). The Court has left open, however, the procedures and methods the circuits must follow in making the determination of whether an action was taken under color of state law. In its recent decision, *United States v.*

Lanier, 117 S. Ct. 1219 (1997), this Court deliberately left open the question of whether the actions were taken under color of state law. In an attempt to find their own way in making this determination, the circuits have each developed their own standards and procedures. The state of the law on the color-of-law issue is, therefore, unclear and conflicting.

This Court should issue more definitive standards and procedures to guide the lower courts in their state action determinations. Without such a ruling, the lower courts are left on their own to attempt to follow a disarray of decisions.

The Court should also guide the lower courts with regard to whether a defendant should be bound by his admission of a legal conclusion in his Answer to the Complaint filed against him. This issue has never been decided by this Court or a federal circuit. As this issue may be dispositive of some actions, a definitive ruling by this Court is needed to guide the lower courts.

I.

THE DETERMINATION OF WHETHER AN ACTION WAS TAKEN UNDER COLOR OF STATE LAW MUST BE MADE IN LIGHT OF THE TOTALITY OF THE CIRCUMSTANCES.

A defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255 (1988). Thus, a defendant is acting under color of state law when he abuses a position given to him by the state. *Id.* at 50, 108 S. Ct. at 2255-56; *Morgan v. Tice*, 862 F.2d 1495, 1499 (11th Cir. 1989), *cert. denied*, 493 U.S. 813, 110 S. Ct. 61 (1989). Section 1983 is implicated when a state actor's "conduct is such that

the actor could not have behaved in that way but for the authority of his office." *Martinez v. Colon*, 54 F.3d 980 (1st Cir. 1995).

The Eleventh Circuit erred in attempting to establish a bright line test for determining when action is taken under color of state law. In order to make the determination of whether Bryant acted under color of state law or as a private individual, the court must look to the total circumstances surrounding the parties and the opportunity these circumstances provided. By failing to do so, the Eleventh Circuit has departed from the procedures established by other federal circuits.

In order to determine if a state actor was acting under color of state law or was engaged in purely personal activity, the court must assess the nature of his conduct in light of the totality of the circumstances. *Martinez v. Colon*, 54 F.3d 980 (1st Cir. 1995). *See also Pitchell v. Callan*, 13 F.3d 545, 548 (2d Cir. 1994); *Revene v. Charles County Comm'rs*, 882 F.2d 870, 872-73 (4th Cir. 1989); *Traver v. Meshriy*, 627 F.2d 934, 938 (9th Cir. 1980); *Layne v. Sampley*, 627 F.2d 12 (6th Cir. 1980); *Payne v. Government of District of Columbia*, 559 F.2d 809, 825 n.9 (D.C. Cir. 1977).

The Eleventh Circuit's attempt to "draw a line" which determines whether an action was taken under color of state law is clearly contrary to the decisions of other circuits. *See Martinez v. Colon*, 54 F.3d 980 (1st Cir. 1995). Instead, other circuits examine the total circumstances surrounding the action in question. For example, often in decisions determining whether a public employee committed an act under color of state law, a crucial factor is the nature of the relationship between the parties. This relationship is often examined by the court as part of the overall circumstances surrounding the alleged state action. Where a relationship is based on the perpetrator's position as a state employee, a court is more likely to find state action when he uses the appearance of authority that position provides.

As noted by Senior District Judge Aldrich in her dissent to the Eleventh Circuit decision, this case is analogous to *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991). In *Dang Vang*, a state employee raped two women who had come to him for assistance in gaining employment through his agency. Both women contacted him originally to find a job. When one woman was unsuccessful at finding employment, she later returned for assistance in learning to drive. He raped her one day when he picked her up to study for the driving test. He raped the other woman at least sixteen times, once when he pressured her to travel out of state with him to make a delivery. The Ninth Circuit found that the perpetrator "came into contact with the plaintiffs and used his position in the state government to deprive these women of their constitutional right to be free from sexual assault." *Id.* As with the defendant in *Dang Vang*, Bryant was able to meet and establish a relationship with Almand because of her need for his help. He, like the *Dang Vang* defendant, used his position to gain access to her in order to rape her. Had the Eleventh Circuit viewed the totality of the circumstances leading up to Almand's rape, as done by the Ninth Circuit, an entirely different outcome was likely.

The Fifth Circuit also viewed the state actor's alleged unconstitutional conduct in light of the total circumstances. In *Doe v. Rains County Independent School District*, 76 F.3d 666 (5th Cir. 1995), the perpetrator was a high school coach who had sexual relations with one of his student. They began a sexual relationship and had contact both during and after school hours. The Fifth Circuit relied on an earlier case, *Doe v. Taylor*, 15 F.3d 443 (5th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 70 (1994), in finding that the coach acted under color of state law. The facts of the two cases were substantially similar. A high school teacher with a reputation of inappropriate behavior with female students initiated a sexual relationship with a student that lasted several months and occurred both during and after

school hours. Most importantly, the court recognized that the teacher "took full advantage of his position as Doe's teacher and coach to seduce her." *Doe v. Taylor* at 452 n.4. As a result, because there was "a 'real nexus' between the activity out of which the violation occur[red] and the teacher's duties and obligations as a teacher," the activity was undertaken under color of state law. *Id.*

In a concurring opinion, Judge Higgenbotham elaborated on this reasoning. He found:

> Stroud's [the teacher's] official interactions with Doe and his sexual involvement with her together constituted an indivisible, ongoing relationship. . . . The importance of Stroud's position as Doe's teacher becomes clearer when one considers [the dissent's] contention that Stroud did not exchange formal rewards for sexual favors from Doe. . . . The very official nature of this attention facilitated his efforts — and indeed enabled him--to violate her rights.

Id. at 461 (Higgenbotham, J., concurring). The Fifth Circuit reached this decision by viewing the different aspects of their relationship and making a determination according to them. Had the Fifth Circuit followed the reasoning now espoused by the Eleventh Circuit, it most likely would not have reached the same result. A question arises, therefore, as to whether a court should look to the total circumstances, including those which occurred prior to the act, or should only view the immediate act.

The Fifth Circuit also found state action in a case factually similar to this appeal. The comparison of this decision and that rendered by the Eleventh Circuit most clearly shows the

completely disparate approaches the circuits take in their approach to this question and the resulting conflicting decisions. In *Bennett v. Pippin*, 74 F.3d 578, 589 (5th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 68 (1996), a sheriff raped a homicide suspect during the course of the investigation. After killing her husband in a domestic dispute, Bennett was questioned, then released by the police. When Bennett returned home, the sheriff who had initially responded to the call was waiting on the porch, purportedly to allay Bennett's fears that her husband's friends would retaliate against her. After the two talked on the porch for a while, Bennett went inside to sleep only to wake to find the sheriff in her room. He proceeded to rape her and then instructed her to tell no one of the event. Viewing the circumstances leading up to the rape, the Fifth Circuit found that the sheriff used his position of power to accomplish the rape of Bennett. He used his position to learn information about Bennett and he used his authority to impress upon Bennett that he had the power to put her in jail.

The Eleventh Circuit distinguished Bryant's actions from those of the sheriff in *Bennett* by stating that Bryant gained entry to the apartment by forcibly breaking in. 103 F.3d at 1515. (App. A, 11a). This distinction, however, seems misguided. The evidence in *Bennett* was that the victim awoke to find the sheriff in her room, at which time he proceeded to rape her. Based on this finding, it would seem clear that the sheriff in *Bennett* entered the victim's home without her consent. While the *Bennett* decision does not address whether the sheriff used force to gain entrance, Almand argues that placing emphasis on this lone fact is misguided. The Fifth Circuit's reliance on a view of the total circumstances more adequately addresses the issue of whether the action is taken under color of law.

The Eleventh Circuit found that since Bryant gained entry to Almand's apartment by breaking in without her consent, "any

thug or burglar could have committed the same violent acts." 103 F.3d at 1515. (App. A, 11a). The court also noted that "[o]nce Bryant resorted to sheer force to break, to enter, and to rape, his status as a police officer had no bearing on his wicked behavior." *Id.* This finding is misguided. Almand asserts that as stated by Senior District Judge Aldrich, " 'any other ruffian' could have raped Almand, but Bryant's status as a police officer made it possible for him to do so in a way that another could not." *Id.* at 1516. (App. A, 16a).

The Eleventh Circuit seeks to remove Bryant's actions in reentering Almand's apartment without consent from all of the circumstances leading up to that moment. This focus on one moment in time is in direct conflict with the approach to the issue taken by the other federal circuits. Without the relationship Bryant was able to establish with Almand due to his official position, he would not have been given the opportunity to gain access to her and her home at all. As noted by the Senior District Judge Aldrich, Almand unlocked her door to allow Bryant to enter. This initial access was obtained by Bryant on the pretense of discussing police business with her.

The Eleventh Circuit's great emphasis on their finding that Bryant "forcibly" broke in, making him like any other ruffian, ignores the evidence of how Bryant gained access to Almand in the first place. As noted by Senior District Judge Aldrich, this door was unlocked by Almand specifically for Bryant because he was a police officer. Almand argues that Judge Aldrich in her dissent correctly decides this issue when she determines that a "reasonable finder of fact could find that Bryant's abuse of his position as a police officer induced Almand to unlock the door so that he could rape her. Thus, Bryant's abuse of his position as an officer of the state made his rape of Almand possible, and he acted under color of state law." 103 F.3d at 1516. (App. A, 15a).

Judge Aldrich's position is more closely analogous to the decisions of the other federal circuits. Instead the Eleventh Circuit chose to concentrate on one small part of the entire event while ignoring the greater total circumstances. The caselaw of other circuits dictates that Bryant's reopening the door to rape Almand should not be separated from the totality of the circumstances which brought him there in the first place.

II.

THE ISSUE OF WHETHER AN ACTION WAS TAKEN UNDER COLOR OF STATE LAW MAY BE A MIXED QUESTION OF LAW AND FACT.

The Eleventh Circuit erred when it stated that "whether conduct constitutes state action is no simple question of fact," and then proceeded to classify the color of state law question as a legal conclusion. 103 F.3d at 1513. (App. A, 7a-8a). By so doing, the circuit completely departed from the precedent of treating the color of law issue as a mixed question of law and fact when required by the circumstances of the case.

In finding the color of law question to be a legal conclusion, the circuit wrongly interpreted two of this Court's cases, *Blum v. Yaretsky*, 457 U.S. 991, 102 S. Ct. 2777 (1982) and *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708 (1980). The circuit's reliance on these cases is misplaced as they are clearly unlike that which is now before this Court.

In *Blum*, the Court dealt with a pure question of "state action", versus the "under color of law" issue in the present case. More importantly, there was no factual dispute present in *Blum*. Therefore, the only remaining question to be decided was a question of law. *Cuyler* involved a habeas corpus case, rather than a § 1983 action. In a footnote discussing the fact that the

state action argument had not been raised in the Court of Appeals, the court referred to the necessity of resolving this "question of law." This dicta does not amount to a holding that all such determinations are exclusively questions of law.

While in certain cases it is possible to determine the color-of-state-law issue as a matter of law, in some actions " 'unanswered questions of fact regarding the proper characterization of the actions' are for the jury to decide." *Layne v. Sampley*, 627 F.2d 12, 13 (6th Cir. 1980) (*quoting Rowe v. Tennessee*, 609 F.2d 259, 265 (6th Cir. 1979).

In *Duke v. Smith*, a § 1983 action, the Eleventh Circuit reviewed *de novo* the district court's order that the plaintiffs had failed to prove state action as required by § 1983 since "the issue of state action is a mixed question of law and fact." 13 F.3d 388, 392 (11th Cir. 1994). The Almand panel flatly ignored this holding, however, and treated the color of law issue as solely a question of law. More importantly, the Eleventh Circuit has ignored the decisions of other circuits which have looked to the issue as a mixed question.

III.

A DEFENDANT SHOULD BE BOUND BY HIS ADMISSION IN HIS ANSWER THAT HE WAS ACTING UNDER COLOR OF STATE LAW.

Federal Rule of Civil Procedure 8(b) states in pertinent part that "[a] party shall state in short and plain terms the party's defenses to each claim asserted and shall **admit or deny** the averments upon which the adverse party relies." Fed. R. Civ. P. 8(b) (emphasis added). The commonly accepted definition of an admission in regard to a pleading is "[t]he acknowledgment or recognition by one party of the truth of some matter alleged

by the opposite party, made in a pleading, the effect of which is to narrow the area of facts or allegations required to be proved by evidence." *Black's Law Dictionary*, 48 (6th ed. 1990).

Almand filed her original Complaint against Bryant on August 17, 1992. Paragraph 3 of the Complaint stated in part:

> Defendant, FLOYD RICHARD BRYANT, was at all times herein a law enforcement officer certified by the State of Georgia and employed by the County of DeKalb, Georgia as a police officer whose conduct described herein **was taken under color of state law.**[1]

(Emphasis added). Bryant filed his Answer to Almand's original Complaint on October 5, 1992. On page four of Bryant's Answer, he specifically stated "This defendant admits the allegations of paragraph 3." As such, Bryant acknowledged the truth of Almand's allegation that his actions were taken under color of law.

After filing her original Complaint, Almand later motioned the district court to amend her Complaint to add additional claims, an additional defendant, and an additional plaintiff. Paragraph 4 of Almand's Amended Complaint realleged verbatim paragraph 3 of Almand's original Complaint. Accordingly, Bryant was once again given an opportunity to respond to this allegation when he filed his Answer to Almand's Amended Complaint on October 19, 1992. Had Bryant considered whether his actions were taken under color of law to be an issue, he should have argued such at this second opportunity to deny liability. Instead, page five of Bryant's Answer to Almand's Amended Complaint states "This defendant admits the allegations of paragraph 4."

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1. The "conduct described herein" includes the rape of Almand.

Unlike the other defendants in this litigation, at no time has Bryant ever moved to amend his Answers to assert the defense that he was not acting under color of state law when he raped Almand. Almand asserts that Bryant should be barred from now attempting to make a controversy out of this already settled matter.

The Eleventh Circuit found Bryant's admission in his Answers to be of "questionable importance." 103 F.3d at 1513. (App. A, 8a). The circuit went on to "wonder whether the admission has effect for conclusions of law that are set out in the complaint." *Id.* While Almand was unable to locate a federal case addressing the issue of an admission of a conclusion of law, she would argue that the circuit has misconstrued Bryant's admission since color of state law in this case is not a conclusion of law but a mixed question of law and fact. A definitive answer in needed to resolve this important question which is currently left completely open by federal law.

The Eleventh Circuit held that construing Bryant's answer as a binding admission of the color-of-state-law issue would violate Fed. R. Civ. P. 8(f)'s mandate to construe all pleadings in a way that does substantial justice. 103 F.3d at 1513. (App. A, 8a). The circuit relied on *Maty v. Grasselli Chemical Co.*, 303 U.S. 197, 199-201, 58 S. Ct. 507, 509 (1988) which held that "[p]leadings are intended to serve as a means of arriving at fair and just settlements of controversies between the litigants. They should not raise barriers which prevent the achievement of that end." *Id.*

Almand asserts, however, that substantial justice is done by requiring Bryant to abide by the admission which he twice made and has never requested to amend. It is not as if this issue is the touchstone of Bryant's § 1983 liability. As the district court noted in its March 29, 1996 Order, Almand must prove

that Bryant acted under color of state law at trial as an element of her § 1983 claim irrespective of whether the defendants have raised it as a defense.[2] To deny Bryant's Motion for Summary Judgment simply allows Almand to proceed to the jury with her evidence in an effort to meet her burden of persuasion regarding this issue.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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2. This Order, in part, denied the motions of defendants DeKalb County and Director Brown to amend their Answers to add the defense that even if Bryant raped Almand, he did not do so under color of state law.

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED JANUARY 24, 1997

Mary Elizabeth ALMAND,
Plaintiff-Appellee,

Joann Warren, Plaintiff-Appellee,

v.

DeKALB COUNTY, GEORGIA and DeKalb County Department of Public Safety, et al.,
Defendants-Appellees,

Floyd Bryant, Detective in His Individual and Official Capacity, Defendant-Appellant.

No. 95-8866.

United States Court of Appeals,
Eleventh Circuit.

Jan. 24, 1997.

* * *

Appeal from the United States District Court for the Northern District of Georgia.

Before EDMONDSON, Circuit Judge, FAY, Senior Circuit Judge, and ALDRICH *, Senior District Judge.

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* Honorable Ann Aldrich, Senior U.S. District Judge for the Northern District of Ohio, sitting by designation.

Appendix A

EDMONDSON, Circuit Judge:

This appeal on qualified immunity raises a question about when a police officer is or is not acting under color of state law for the purpose of 42 U.S.C. § 1983. We conclude that color of state law has not been shown and reverse the denial of summary judgment to the defendant.

I. *Facts*[1]

In July 1990, Plaintiff-Appellee Mary Almand (Almand) discovered that her daughter, Monique, was missing from home.[2] While posting and passing out fliers near a convenience store in Atlanta, Georgia, Almand first met the defendant, Floyd Bryant (Bryant), a police officer of the DeKalb County Police Department.[3] Bryant, who was not in uniform, approached Almand in the parking lot of the store and asked her why she was there. Almand told him that she was looking for someone,

1. Most of the "facts" we recite are only assumed facts — resolving disputes in Plaintiff's favor and giving Plaintiff the benefit of all reasonable inferences — for the purposes of reviewing a summary judgment decision. A trial might show the actual facts to be different from some facts we set out here. *See generally Rodgers v. Horsley,* 39 F.3d 308, 309 (11th Cir.1994). Defendant-Appellant Bryant denies the wrongdoing.

2. Monique had apparently gone with a neighbor named Tree to what Monique thought was an audition for a concert. According to Almand, however, Tree took Monique to a hotel where she was held against her will and raped by two men. After several days, Monique was able to call her mother, tell her where she was, and have her mother send the Atlanta police to pick her up.

3. Although a DeKalb County Police Officer at the time of the events herein described, Floyd Bryant has since resigned.

and Bryant showed her his badge. Almand then revealed that she was searching for her daughter. Bryant offered his assistance as a police officer in finding Almand's daughter on the condition that Almand go out on a date with him. Almand refused the date, but asked nonetheless for his help in finding her daughter. Bryant obtained Almand's phone number so that he could contact her if information turned up about Monique. Almand and Bryant later had several telephone conversations about Almand's daughter.

Approximately one week after her disappearance, Monique returned home with the help of the Atlanta Police Department. That same day, Almand related to Bryant what her daughter had been through. Bryant indicated that he had an idea of where Almand's daughter had been held and who had raped her.

The Atlanta Police Department later told Almand that things like those which happened to her daughter occur often in the area and that nothing could probably be done to locate the persons responsible for her daughter's rape. About one week after Monique's return home, Bryant called Almand and offered to reveal important information about the rape of her daughter, information so sensitive it could cost him his job. Bryant conditioned the disclosure on Almand's agreeing to have sex with him. Almand agreed but declined to go through with it when Bryant arrived at her apartment.

Despite Almand's rejection of his demand for sexual favors, Bryant agreed to continue helping Almand investigate her daughter's rape. This time, however, his offer was contingent upon Almand agreeing to help Bryant expose a "dirty cop," a specific DeKalb Officer. Bryant said he believed that this other police officer was — among other things — connected with the

persons who raped Almand's daughter. Almand agreed to help Bryant, which she says she did.

Later, in August 1990, Bryant showed up at Almand's apartment breathing hard and sweating. He asked to come in to talk with her on urgent matters about her daughter. Almand admitted Bryant. Once inside the apartment, Bryant asked Almand why she was leading him on; and he began making sexual advances. Almand asked Bryant to leave; and although he declined at first, he eventually agreed to leave. Bryant went out the door, and Almand closed it behind him.

From outside, Bryant then forced open the closed door with such shock that wood broke off the door. Having pushed open the door, Bryant reentered Almand's apartment, physically struggled with her, and forcibly raped her. No report was made to the police at the time.

A few days later, Almand was arrested for drug trafficking.[4] The case against her was eventually nolle prossed because, according to the Superior Court, "Investigative Officer [Bryant was] found to have engaged in conduct which was inappropriate under the circumstances and therefore compromised the State's ability to prove its case against [Almand]."

II. *Procedural Background*

Almand filed her original complaint against Defendants Bryant, DeKalb County and several other defendants in August 1992. Later, Almand filed an amended complaint adding

4. Almand contended that her arrest was for conduct she undertook as part of her agreement to help Bryant expose the other police officer. Bryant denied that Almand was working with him.

additional claims, an additional defendant, and an additional plaintiff. As amended, Almand's complaint, invoking 42 U.S.C. § 1983, covered about 44 pages and alleged the violation of constitutional rights protected by the Fourth and Fourteenth amendments, the violation of state and federal Racketeer Influenced Corrupt Organization statutes,[5] and various state tort law claims.

All defendants moved for summary judgment. The district court denied summary judgment to Bryant. Bryant appealed the district court's denial of his motion for summary judgment; the motion had been based on qualified immunity. The substance of Almand's claim before us is the rape at her apartment.

III. *Discussion*

Federalism is important to this case. Section 1983 creates no substantive rights; it merely provides a remedy for deprivations of federal statutory and constitutional rights. *Whiting v. Traylor,* 85 F.3d 581, 583 (11th Cir.1996) (citations omitted). As the Supreme Court has cautioned, the "constitutional shoals that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law," demand that we vigilantly safeguard against converting section 1983 into "a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis,* 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 47 L.Ed.2d 405 (1976) (internal citations omitted), *reh'g denied,* 425 U.S. 985, 96 S.Ct. 2194, 48 L.Ed.2d 811 (1976). Thus, section 1983 must not supplant state tort law; liability is appropriate solely for violations of federally protected rights. *Baker v. McCollan,* 443 U.S. 137, 145-46, 99 S.Ct. 2689, 2695, 61 L.Ed.2d 433 (1979).

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5. The District Court dismissed all state and federal RICO claims.

Appendix A

A successful section 1983 action requires that the plaintiff show she was deprived of a federal right by a person acting under color of state law. *Harvey v. Harvey,* 949 F.2d 1127, 1130 (11th Cir.1992) (citing *Flagg Brothers, Inc. v. Brooks,* 436 U.S. 149, 155-56, 98 S.Ct. 1729, 1733, 56 L.Ed.2d 185 (1978)). We accept that, under certain circumstances, a rape of a person by a police officer or other state actor could violate the Constitution. *See Parker v. Williams,* 862 F.2d 1471 (11th Cir.1989) (involving rape by uniformed deputy sheriff of woman in his custody because of his representation that her bail had been revoked and that she would have to return to jail with him); *see also Dang Vang v. Vang Xiong X. Toyed,* 944 F.2d 476, 479-80 (9th Cir.1991) (upholding jury's determination that defendant acted under color of state law when he, as employee of Washington State Employment Security office, raped women looking for employment when meeting with them under the pretext of providing services pursuant to his state job). Here, however, Bryant was not acting under color of state law at the pertinent time. Almand, therefore, cannot make out the elements of her section 1983 case, and summary judgment must be granted to Bryant on the section 1983 claim.

A person acts under color of state law when he acts with authority possessed by virtue of his employment with the state. *Edwards v. Wallace Community College,* 49 F.3d 1517, 1522 (11th Cir.1995) (citing *West v. Atkins,* 487 U.S. 42, 48-50, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988)). Not all acts by state employees are acts under color of law. *Id.* at 1523. "The dispositive issue is whether the official was acting pursuant to the power he/she possessed by state authority or acting only as a private individual." *Id.* (citing *Monroe v. Pape,* 365 U.S. 167, 183-84, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), *overruled on other grounds by Monell v. Department of Social Servs.,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

Ms. Almand first argues that Officer Bryant admitted that he was acting under color of state law in his answer to the complaint. Paragraph 3 of Almand's complaint states in relevant part:[6]

3.

> Defendant, FLOYD RICHARD BRYANT, was at all times herein a law enforcement officer certified by the State of Georgia and employed by the County of DeKalb, Georgia as a police officer whose conduct described herein was taken under color of state law . . .

In Bryant's answer to Almand's complaint, he states, "This defendant admits the allegations of paragraph 3." Bryant's "admission," however, does not end our color-of-state-law inquiry.

Whether conduct constitutes state action[7] is no simple

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6. In both her original and amended complaint, Almand includes this exact paragraph. In her original complaint, this allegation is denoted as Paragraph 3; in her amended complaint it is Paragraph 4. Bryant answered each of Almand's complaints, and his answer to this allegation was the same both times.

7. We have noted that the concepts of action under color of state law and state action are coterminous. *Burrell v. Board of Trustees of GA. Military College,* 970 F.2d 785, 790 n. 13 (11th Cir.1992), *cert. denied,* 507 U.S. 1018, 113 S.Ct. 1814, 123 L.Ed.2d 445 (1993). While the Supreme Court, in *Lugar v. Edmondson Oil Co.,* 457 U.S. 922, 935 n. 18, 102 S.Ct. 2744, 2752 n. 18, 73 L.Ed.2d 482 (1982), left open the theoretical possibility that action under color of state law might not always constitute state action, the example given by the Court of a private person applying a state statute has no relevance to our case. "[T]he Court pointed out that 'it is clear that in a § 1983 action

(Cont'd)

question of fact. *See Blum v. Yaretsky,* 457 U.S. 991, 996-98, 102 S.Ct. 2777, 2782, 73 L.Ed.2d 534 (1982) (describing the question of whether there is state action as question of law); *Cuyler v. Sullivan,* 446 U.S. 335, 342 n. 6, 100 S.Ct. 1708, 1715 n. 6, 64 L.Ed.2d 333 (1980) (determining if state action exists is resolution of question of law); *see also Duke v. Smith,* 13 F.3d 388, 392 (11th Cir.1994) (reviewing de novo, as a mixed question of law and fact, district court's determination that private actor was not sufficiently intertwined with government entity to be engaged in state action). As such, Plaintiff's pleading of the legal conclusion on color of state law in the complaint and Defendant's admission in the answer are of questionable importance. The answer admits the facts alleged in Paragraph 3, but we wonder whether the admission has effect for conclusions of law that are set out in the complaint.

More important, construing Bryant's answer to Paragraph 3 of Almand's complaint as a binding admission of the color-of-state-law element would violate Fed.R.Civ.P. 8(f)'s mandate to construe all pleadings in a way that does "substantial justice." In construing Rule 8(f), the Supreme Court, in *Maty v. Grasselli Chemical Co.,* 303 U.S. 197, 199-201, 58 S.Ct. 507, 509, 82 L.Ed. 745 (1938), wrote that "[p]leadings are intended to serve as a means of arriving at fair and just settlements of controversies between the litigants. They should not raise barriers which prevent the achievement of that end."

Viewing Bryant's admission to Paragraph 3 of Almand's

(Cont'd)

brought against a state official, [as in the present case,] the statutory requirement of action under color of state law and the state action requirement . . . are identical.' " *Burrell,* 970 F.2d at 790 n. 13 (quoting *Lugar,* 457 U.S. at 929, 102 S.Ct. at 2749).

complaint in the context of all of the pleadings,[8] we are confident that Almand was put on notice that the issue of state action was disputed. For example, in his answer, Bryant expressly denied that he was at Almand's residence on the pertinent date, that he broke in her door, and that he raped her. He also expressly asserted in his answer that the complaint stated no cause of action under the laws or the Constitution of the United States. In addition, in Bryant's brief filed with and in support of his motion to the district court for summary judgment, Bryant stated that, if Almand's complaint could be construed as alleging a constitutional violation against him, "no action by him was taken under color of state law, for purposes of § 1983 liability."

In the light of Bryant's denial of the central factual components of Almand's case, the most he can justly be said to have admitted is that when he did not go to Almand's house, did not break down her door and did not rape her, he was acting under color of state law. We believe Almand was neither mislead nor surprised unfairly about whether color of state law was a question in dispute when summary judgment was being sought by Bryant. We, therefore, conclude that Bryant's answer to Almand's complaint does not settle the state-action question.

Here, the assumed facts show that Bryant was acting as a private person, not a state actor under color of state law, when he forced his way into Almand's home and, overcoming her resistance by force, raped her. On the day of the rape, Bryant initially gained entry to Almand's apartment on the pretense of discussing police business with her — the progress of the investigation into Almand's daughter's rape. Bryant then made

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8. "A pleading . . . if possible, will be construed to give effect to all its averments." 5 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1286 (1990).

sexual comments and advances toward Almand, and she demanded that he leave her apartment.

Bryant complied with Almand's request and left her home. Almand *fully closed* the front door. Having been excluded from Almand's apartment, Bryant then burst open the front door with such force that the door was damaged;[9] and he committed the rape inside the apartment.

Bryant's initial entry into Almand's apartment probably was conducted under color of state law: he gained access to Almand's apartment because of his status as a police officer and his proffer of information about Almand's daughter.[10] But then, Almand excluded Bryant from her apartment and closed the door completely.

When Bryant reentered the apartment by forcibly breaking in, he was no different from any other ruffian.[11] Bryant's act of breaking into the apartment and, by force, raping Almand was a private act not accomplished because of "power possessed by virtue of state law and made possible only because the wrongdoer [was] clothed with the authority of state law." *West*, 487 U.S. at 59, 108 S.Ct. at 2255 (quoting *United States v.*

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9. The extent of the force is not critical to us, but the fact of an uncontested-to entry which was accomplished by some degree of physical force against a barrier is important.

10. We note, by the way, that Bryant was not in uniform and was off-duty at the time of these events.

11. While not every grievous offense against morality is a violation of the Federal Constitution, we believe the conduct alleged about Bryant would amount to torts and crimes, including burglary, under Georgia law.

Classic, 313 U.S. 299, 326, 61 S.Ct. 1031, 1043, 85 L.Ed. 1368 (1941), *reh'g denied*, 314 U.S. 707, 62 S.Ct. 51, 86 L.Ed. 565 (1941)); *cf. Bennett v. Pippin*, 74 F.3d 578, 589 (5th Cir.1996) (concluding rape of criminal suspect by sheriff was under color of state law when rape victim knew sheriff was investigating her case and where sheriff overcame her resistance by intimidation linked to his authority: "I can do what I want, I'm the sheriff"), *cert. denied*, __ U.S. __, 117 S.Ct. 68, 136 L.Ed.2d 29 (1996); *Dang Vang*, 944 F.2d at 479 (holding that jury could have reasonably concluded, from expert testimony showing plaintiffs — as Hmong refugees — were "in awe" of government officials, that the "defendant used his government position to exert influence and physical control" over the plaintiffs). Considering that Bryant gained entry to the apartment by forcibly breaking in, any thug or burglar could have committed the same violent acts. Once Bryant resorted to sheer force to break, to enter, and to rape, his status as a police officer had no bearing on his wicked behavior.

Our color-of-state-law conclusion requires us to engage in line drawing. But, in the words of Justice Holmes, "the great body of the law consists in drawing such lines," *Schlesinger v. Wisconsin*, 270 U.S. 230, 241, 46 S.Ct. 260, 262, 70 L.Ed. 557 (1926) (Holmes, J., dissenting); "[n]either are we troubled by the question where to draw the line. That is the question in pretty much everything worth arguing in the law. Day and night, youth and age are only types." *Irwin v. Gavit*, 268 U.S. 161, 168, 45 S.Ct. 475, 476, 69 L.Ed. 897 (1925) (Holmes, J.). In the circumstances of this case, we draw the line at the front door of Almand's apartment. When Bryant, by physical force, broke into Almand's residence, he was not then gaining entry by virtue of any authority he might have been given by the state to act as a police officer.

We conclude that Bryant was not acting under color of state law when he broke into Almand's apartment and raped her. His conduct (if he did the things alleged) was the act of a private citizen and did not violate the Constitution.[12] So, Bryant is due summary judgment. The district court's denial of summary judgment to Bryant on this section 1983 count is reversed. The case is remanded for further proceedings not in consistent with this judgment.

REVERSED and REMANDED.

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12. In qualified immunity cases, "[a] necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is 'clearly established' at the time the defendant acted [that is, the qualified immunity question] is the determination of whether the plaintiff has asserted a violation of a constitutional right at all." *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991), *reh'g denied*, 501 U.S. 1265, 111 S.Ct. 2920, 115 L.Ed.2d 1084 (1991).

Appendix A

ANN ALDRICH, Senior District Judge, dissenting:

I respectfully dissent. If Floyd Bryant raped Mary Almand,[1] there is at least a genuine issue as to whether he did so under color of state law. Therefore, I would affirm the district court's denial of Bryant's motion for summary judgment.

I.

In order to prevail in an action brought under 42 U.S.C. § 1983, a plaintiff must show that (1) a person acting under color of state law (2) deprived her of a right secured by the United States Constitution or other federal laws. *Duke v. Smith,* 13 F.3d 388, 392 (11th Cir.1994). The majority apparently concedes that, if Bryant did rape Almand under color of state law, then he violated her constitutional right to bodily integrity. *See Albright v. Oliver,* 510 U.S. 266, 271-73, 114 S.Ct. 807, 812, 127 L.Ed.2d 114 (1994) (citations omitted); *Doe v. Taylor Indep. School Dist.,* 15 F.3d 443, 450-52 (5th Cir.), *cert. denied,* __ U.S. __, 115 S.Ct. 70, 130 L.Ed.2d 25 (1994); *Stoneking v. Bradford Area School Dist.,* 882 F.2d 720, 726-27 (3rd Cir.1989), *cert. denied,* 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990); *Parker v. Williams,* 862 F.2d 1471, 1474 (11th Cir.1989). Because there is a genuine issue as to the circumstances under which Bryant may have raped Almand, there is a genuine issue as to whether he deprived her of a constitutional right.

II.

Nevertheless, the majority concludes that Bryant is still

1. As the majority correctly observes, for the purposes of our review of the district court's denial of Bryant's motion for summary judgment, we must assume that Bryant did, in fact, rape Almand.

entitled to summary judgment because his actions in raping Almand were not taken under color of state law. I respectfully disagree.

A defendant acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 2255, 101 L.Ed.2d 40 (1988) (quotation omitted). Hence, a defendant acts under color of state law when he abuses a position given to him by the state. *Id.* at 50, 108 S.Ct. at 2255-56; *Morgan v. Tice*, 862 F.2d 1495, 1499 (11th Cir.), *cert. denied*, 493 U.S. 813, 110 S.Ct. 61, 107 L.Ed.2d 28 (1989). Here, I believe that there is a genuine issue of material fact as to this question.

Viewing the facts in a light most favorable to Almand, it appears that Bryant was able to rape Almand only because of his abuse of his position as a police officer. As the majority notes, Bryant initially obtained access to Almand's home on the day of the rape on the pretense of discussing police business with her. Although the facts are not entirely clear on this point, it appears from Almand's deposition that she unlocked her door for Bryant and admitted him to her home. She testified that she had a double-locked door which could only be opened with a key, and that Bryant came through that door. She also testified that after Bryant entered, she put the key on top of her stereo speaker.[2] A reasonable finder of fact could infer that she unlocked the door for Bryant. The majority concedes that if Bryant had raped Almand at that point, his actions probably would have been taken under color of state law.

2. At another point, Almand testified that Bryant put the key on her speaker. At this stage in the proceedings, however, we must resolve all factual discrepancies in favor of Almand.

Bryant did not rape Almand at that point, however. Instead, he complied with her request to leave and walked out the door. Almand shut the door behind him and turned to get the key to lock the door. At this point, *before Almand could lock the door,* Bryant slammed it open, entered, and raped her.

The majority holds that once Bryant left and then "forcibly" broke in, he was no different than "any other ruffian." If Bryant had broken through a locked door, I might accept this conclusion. If that were the case, Bryant's position as a police officer would have afforded him no advantage in his alleged rape of Almand. There is evidence, however, that Bryant merely had to open an unlocked door, which Almand had unlocked for him specifically because he was a police officer.[3] In other words, construing the evidence in Almand's favor, a reasonable finder of fact could find that Bryant's abuse of his position as a police officer induced Almand to unlock the door so that he could rape her. Thus, Bryant's abuse of his position as an officer of the state made his rape of Almand possible, and he acted under color of state law.

This case is analogous to *Dang Vang v. Vang Xiong X. Toyed,* 994 F.2d 476 (9th Cir.1991). In *Dang Vang,* the defendant was a state employee who was responsible for interviewing Hmong refugees and finding employment for them. On the pretense of taking women job-hunting, he lured them to a motel and raped them. As the Ninth Circuit noted, however, the plaintiffs came into contact with the defendant because of their need for employment, and the jury could have reasonably concluded that

3. It is also possible, but not clear from Almand's testimony, that Bryant opened the door with such force that it did not matter that the door was not locked. If he did, then I would agree that Bryant did not act under color of state law. That fact is not clear, however, and we must resolve all factual disputes in favor of Almand.

"the defendant used his government position . . . in order to sexually assault them." *Id.* at 480. Similarly, Almand came into contact with Bryant because of her need for police help, and Bryant used his position to gain access to her home in order to rape her. Again, "any other ruffian" could have raped Almand, but Bryant's status as a police officer made it possible for him to do so in a way that another could not.

III.

On the specific facts of this case, I conclude that, assuming Bryant did rape Almand, there is at least a genuine factual issue as to whether he did so under color of state law.[4] Accordingly, I would affirm the district court's denial of Bryant's motion for summary judgment. I respectfully dissent.

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4. Because I reach this conclusion, there is no need for me to consider whether Bryant's admission that he acted under color of state law is of any import.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION FILED MAY 30, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

1:92-cv-1958-RCF

MARY ELIZABETH ALMAND and JOANN WARREN

vs.

DEKALB COUNTY, GEORGIA, et al.

ORDER

This action is before the court on plaintiffs' motion to alter or amend judgment [#128-1]. The motion is unopposed.

In the court's Order of September 26, 1994 [September Order], the court dismissed plaintiff Warren's complaint on statute of limitations grounds, finding that the statute was not tolled as a matter of law. The court also dismissed plaintiff Almand's motion on this ground, and additionally held that plaintiff Almand's failure to exercise diligence in serving defendants rendered her non-RICO claims outside the statute of limitations. The court also dismissed all of plaintiffs' RICO claims under Georgia and federal law.

Plaintiffs return to the court essentially asking the court to reconsider its dismissal of their complaint on statute of limitations grounds. Plaintiff Warren essentially renews her tolling arguments, and plaintiff Almand argues that she was indeed diligent in serving defendants.

Appendix B

The court is not above admitting its own errors. When considering the file in preparing the September Order, the court noted that summons forms were issued to plaintiff Almand on August 31, 1992, and that the forms were not mailed until September 9, 1992. The court did not take into account, however, that the forms were mailed from the Clerk's office to plaintiff's counsel, and that the Labor Day holiday slowed the service of mail beyond its customary pace. Thus, the court did not consider that plaintiff's counsel did not receive the summons forms until September 7, 1992, when reaching its decision. Though the court still believes service by mail was not the most diligent option, given the circumstances of this case, the court cannot continue to regard plaintiff Almand as displaying no diligence whatsoever in serving defendants. Therefore, the court vacates its previous Order, and finds that plaintiff Almand's claims are not barred by the statute.

As to plaintiff Warren's argument that her alleged disability tolled the applicable statute of limitations, the court stands by its September Order. The court reiterates that recognition of rape trauma syndrome as a factor tolling the statute would be a welcome change in the law. However, as the court noted in the September Order, such a recognition would still constitute a change. The law as it now stands compels the court to conclude, as a threshold *legal* matter, that plaintiff Warren's claims are untimely.[1] Thus, plaintiff Warren's motion is denied.

Given the court's determination today, the judgment as entered must be amended. Further, the motions for summary

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1. The court also stands by its earlier determination that defendants have not waived any statute or limitations arguments.

judgment regarding the claims of plaintiff Almand remain to be considered on their merits.[2] The court now proceeds to do so.

Background

An understanding of the issues in this case involves a detailed summary of plaintiff's factual allegations. Plaintiff Almand alleges that she first met defendant Floyd Bryant [Bryant] when she was looking for her missing daughter in Atlanta, and that Bryant agreed to help her. Plaintiff's Statement of Material Facts [Plaintiff's Statement], ¶ 44. Plaintiff's daughter eventually returned home, but had been raped. *Id.*, ¶¶ 45-47. Even though the Atlanta Police Department told plaintiff that nothing more could be done to try to find the rapist of plaintiff's daughter, Bryant said he thought he knew who the perpetrator might be, and that he would continue to help plaintiff. *Id.*, ¶¶ 45, 47. Plaintiff alleges that, at one point, Bryant offered to reveal certain sensitive information to plaintiff in exchange for sex. *Id.*, ¶ 46. Plaintiff maintains that she initially accepted Bryant's offer, but changed her mind. *Id.*

Though it is not entirely clear from plaintiff's brief and statement of material facts, plaintiff apparently alleges that, at some later point unrelated to the abduction of plaintiff's daughter, Bryant told plaintiff that he (Bryant) was investigating defendant Dale Holmes [Holmes] because Holmes was a crooked officer. According to plaintiff, Bryant persuaded plaintiff to participate in an undercover operation designed to "sting" Holmes in return for Bryant's continued help in locating the rapist of plaintiff's daughter. *Id.*, ¶ 49. As part of this operation,

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2. All subsequent references to "plaintiff" will concern plaintiff Almand only.

plaintiff represented to Holmes that she had murdered one of her daughter's rapists, and that she was interested in buying drugs from Holmes. *Id.*, ¶¶ 51, 53. A "transaction" was set up by telephone between Holmes and plaintiff, culminating in plaintiff's arrest on August 17, 1990, for cocaine trafficking in connection with her involvement in the drug transaction with Holmes. *Id.*, ¶ 54-55, 57. Plaintiff spent 32 days in jail, and her case was *nolle prossed* in June, 1991. *Id.*, ¶¶ 57-58. Plaintiff alleges that Bryant raped her on August 15, 1990, two days prior to her arrest. *Id.*, ¶ 56.

Plaintiff set forth 10 causes of action against defendants, two of which (the RICO claims) have been dismissed by the court on their merits, a ruling plaintiff does not challenge. Plaintiff had earlier conceded allegations involving the rape and seduction of plaintiff's daughter, and agrees in her responses to defendants' motions for summary judgment that she cannot establish her claims for false arrest and imprisonment. Thus, as the court reads plaintiff's complaint, she still alleges: (1) constitutional violations of her substantive due process rights, (2) rape by Bryant under Georgia law, (3) intentional infliction of emotional distress, (4) assault and battery by Bryant, (5) negligent hiring and retention, and (6) punitive damages. Unfortunately, plaintiff's complaint and responses to defendants' motions for summary judgment are quite unclear as to which causes of action are asserted against which defendants. So far as the court can tell, given the murkiness of plaintiff's articulated legal theories, plaintiff asserts all claims except #5 against Bryant, all claims except claim #2 (rape) against defendant DeKalb County [the County], and claims #1, #5 and #6 against both Director Thomas E. Brown [Brown] and Major A.R. King [King].[3] The court will refer to the County, Brown, and King

3. The court arrives at this conclusion from a careful reading of (Cont'd)

(in their official capacities) collectively as the "County defendants."

(Cont'd)
plaintiff's amended complaint, bearing in mind the liberal notice pleading requirements under the federal rules. Count One of plaintiff's complaint (claim #1) is clearly designed to establish *Monell* liability against the County and persons responsible for implementing the policy upon which the County's liability is predicated. The actual due process violation, if any, was alleged to have been committed by Bryant. The alleged rape (claim #2) and battery (claim #4) allegations concern only Bryant.

Plaintiff also has apparently abandoned her claims against Holmes. Holmes' putative liability would have rested upon his actions in investigating plaintiff, actions upon which constitutional violations, false arrest, intentional infliction of emotional distress, and assault and battery claims might have been based. (Holmes did not have the power to hire or fire Bryant.) Plaintiff, however, declines to contest the lawfulness of Holmes' investigatory actions (thus negating her constitutional claim under the Fourth Amendment and her state-law false arrest claim), explicitly concedes her assault and battery claim against Holmes, and utterly fails to even mention how Holmes' actions might be considered "outrageous" enough to sustain a claim of intentional infliction of emotional distress.

Finally, the nature of the liability asserted against Brown and King necessarily precludes any possibility that their actions could have been intentionally directed toward plaintiff. As plaintiff recognizes, this intent is a requirement of Georgia law to assert a claim for intentional infliction of emotional distress. *See Coleman v. Housing Authority of Americus,* 191 Ga. App. 166, 381 S.E.2d, 303, 306 (1989). Plaintiff's focus on the "outrageousness" of Brown and King's conduct is misplaced inasmuch as the threshold requirement of "personal direction" is not satisfied.

Appendix B

DISCUSSION

A. Summary Judgment Standard

Under Fed. R. Civ. P. 56, the court should grant a motion for summary judgment where "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." The movant carries his burden by showing the court that there is "an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett,* 477 U.S. 317, 325, 106 S. Ct. 2548, 2554 (1986).[4] If the movant satisfies this burden, then the burden shifts "to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." *Clark v. Coats & Clark, Inc.,* 929 F.2d 604, 608 (11th Cir. 1991). The nonmovant is then required "to go beyond the pleadings" and present competent evidence in the form of affidavits, depositions, admissions and the like, designating "specific facts showing that there is a genuine issue for trial." *Celotex,* 477 U.S. at 334, 106 S. Ct. at 2553. Generally, "[t]he mere existence of a scintilla of evidence" supporting the nonmovant's case is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252, 106 S. Ct. 2505, 2512 (1986). The court, resolving all reasonable doubts in favor of the nonmovant, must determine "whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented." *Id.*

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4. For issues on which the non-movant bears the burden of proof at trial, the movant may either "show[ ] — that is, point[ ] out to the district court — that there is an absence of evidence to support the non-moving party's case," or present "affirmative evidence demonstrating that the non-moving party will be unable to prove its case at trial." *Fitzpatrick v. City of Atlanta,* 2 F.3d 1112, 1116 (11th Cir. 1993) (citing *United States v. Four Parcels of Real Property,* 941 F.2d 1428, 1437-38 (11th Cir. 1991) (*en banc*)).

B. Plaintiff's Constitutional Claim

Plaintiff claims that her substantive due process right to be secure in the preservation of her bodily integrity was violated by the actions of Bryant,[5] and that the supervisory defendants, the County, Brown, and King, can be held liable under the doctrine of *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978). The court first addresses Bryant's possible liability.

Though the Eleventh Circuit has not faced a set of facts and circumstances such as plaintiff alleges in the instant case, the Fifth Circuit in a recent case had no difficulty finding that sexual misconduct by a public school teacher violated the student's constitutional right to the preservation of her bodily integrity. *Doe v. Taylor Independent School Dist.*, 15 F.3d 443, 451-52 (5th Cir. 1994). In that case, the Fifth Circuit rejected the argument that the teacher's actions were not taken "under color of state law" by pointing out that the teacher enabled the misconduct to take place by, in essence, taking "full advantage of his position as Doe's teacher and coach to seduce her." *Id.*, 15 F.3d at 452 n.4.

In most material respects, this case is no different.

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5. At one time, it appeared that plaintiff asserted her substantive due process claim against Holmes, but she has apparently abandoned that claim. In the briefs discussing the substantive due process claim on the merits, plaintiff does not even mention Holmes, and the court cannot discern any attempt by plaintiff to link Holmes to any constitutional violation. Further, there is no allegation that Holmes was Bryant's superior or performed any policymaking function for the County. Therefore, the court must conclude that either this claim is not asserted against Holmes, or that Holmes is entitled to summary judgment on this claim.

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According to the facts brought forth by plaintiff in opposition to Bryant's motion for summary judgment, which the court construes in her favor, Bryant used his position as a police officer to insinuate himself into plaintiff's affairs, with the ultimate result of plaintiff's alleged rape. Though the court recognizes that Bryant flatly disputes any allegation of rape, the court is not permitted to resolve this most basic of issues at the summary judgment phase. In short, if a jury believes plaintiff's version of the facts, Bryant could be held liable for the constitutional tort.

Therefore, the court now turns to the possible basis for liability of the County, Brown, and King. Under *Monell,* the liability of the County and the supervisors cannot rest upon a simple theory of *respondeat superior*; rather, there must be a showing that there was a policy or custom of the governmental entity, enacted by the policymaking supervisors, that was the "moving force" behind the constitutional violation. *E.g. Farred v. Hicks,* 915 F.2d 1530, 1532-33 (11th Cir. 1990).

Plaintiff's burden in this regard is relatively heavy. To hold the County liable for the acts of Bryant, plaintiff would have to show that Bryant's actions were "officially sanctioned" by the County through its policies and customs. *E.g., Brown v. City of Clewiston,* 848 F.2d 1534, 1538 (11th Cir. 1988). While this does not mean that the County must affirmatively sanction the actions, plaintiff must at least show that there was a policy or custom in place " 'so permanent and well settled' as to have 'the force of law.' " *Id.* (quoting *Monell* in part). Because the County can only "establish" policies and customs through its policymakers, *see Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S. Ct. 1292, 1298-99 (1986), the County's liability turns on whether its final decisionmakers, Brown and King in this

instance, implemented a policy or followed a custom that was the "moving force" behind plaintiff's injuries.

Brown and King, in turn, can also be held liable for the implementation of that policy or custom. In *Brown v. Crawford,* 906 F.2d 667 (11th Cir. 1990), the Eleventh Circuit succinctly stated:

> Supervisory liability occurs either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between actions of the supervising official and the alleged constitutional violation. The causal connection can be established when a history of widespread abuse puts the responsible supervisor on notice of the need to correct the alleged deprivation, and he fails to do so. The deprivations that constitute widespread abuse sufficient to notify the supervising official must be obvious, flagrant, rampant and of continued duration, rather than isolated occurrences.

Id., at 671 (citations omitted). Further, "a supervisory official is not liable under section 1983 for an injury resulting from his failure to train subordinates unless his 'failure to train amounts to deliberate indifference to the rights of persons with whom the subordinates come into contact' and that failure has actually caused the injury of which the plaintiff complains." *Belcher v. City of Foley, Alabama,* 30 F.3d 1390, 1397 (11th Cir. 1994).[6]

6. The same standard applies whether allegations of failure to train or failure to supervise are involved. *Greason v. Kemp,* 891 F.2d 829, 837 n.15 (11th Cir. 1990). In this case, plaintiff alleges both failures.

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The element of "deliberate indifference" is important, because, as the *Belcher* court noted, "[o]nly when the failure to train [or supervise] amounts to 'deliberate indifference' can it be properly characterized as a 'policy' or 'custom' that is necessary for section 1983 to attach." *Id.* (citing *City of Canton v. Harris,* 489 U.S. 378, 389, 109 S. Ct. 1197, 1205 (1989)). As the Supreme Court put it in *Harris,* "[o]nly where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality — a 'policy' as defined by our prior cases — can a [county and supervisors under Eleventh Circuit precedent] be liable for such a failure under § 1983."

Because plaintiff makes no allegation that Brown or King personally participated in the injury to plaintiff, to hold the County, Brown, and King liable for the actions of Bryant, three things must be established: (1) there was an actual failure to train/supervise, (2) those failing to train/supervise Bryant did so with deliberate indifference to those, such as plaintiff, with whom Bryant would come into contact, and (3) there is a causal connection between the failure to train/supervise and the injury suffered by plaintiff. The relevant considerations include, as the *Brown v. Crawford* court noted, whether Bryant's behavior was part of a "widespread" pattern of abuse for which Brown and King should or were put on notice. *Brown,* 906 F.2d at 671. In considering the "widespread-edness" of Bryant's history, the court should consider evidence pointing to "obvious, flagrant, rampant and . . . continu[ous]" activity. *Id.* References to "isolated occurrences" would not suffice. *Id.*[7]

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7. The court recognizes that this requires a high measure of proof from plaintiff. However, this burden is consistent with the Supreme Court's observation in *Harris* that liability must rest on something more than a respondeat superior theory. To simply require plaintiff to point to activities by Bryant that, had the supervisors been diligent enough in their duties to

(Cont'd)

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The court notes that plaintiff has introduced several items of evidence that may or may not show that defendants Brown and King, and the County, failed to properly train or supervise Bryant during the time prior to plaintiff's alleged rape. Unfortunately, plaintiff (in a laudable effort to conserve space) only generally referenced those materials and made only the most broad of legal arguments regarding them. Defendants, on the other hand, did not adequately discuss the failure to train or supervise issues, either. As a result, the court is not comfortable ruling upon the highly fact-specific inquiry that section 1983 dictates within the above-described legal context. Accordingly, the court will require further briefs on this issue, as set forth in the margin below, and will defer ruling at this time on this aspect of the County defendants' motion for summary judgment.[8] The

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(Cont'd)
uncover, should have been detected and punished, would import notions of negligence and general tort theory into section 1983. Further, the Supreme Court in *Harris* noted that deliberate indifference can be shown where "the need for more or different training is *so obvious*, and the adequacy so likely to result in the violation of constitutional rights, that the policymakers of that city can be reasonably said to have been deliberately indifferent to that need." *Harris*, 109 S. Ct. at 1205 (emphasis added). The key is that the supervisors must be faced with a need for correction so obvious that failure to do so can only been considered a "conscious and deliberate" choice to allow the inevitable constitutional violations to occur. Therefore, while the Eleventh Circuit's requirement of "rampant" and "flagrant" behavior would surely be misplaced in general tort law, it is entirely appropriate in the section 1983 context.

8. The parties should address how the facts brought forth by plaintiff in her statement of facts (specifically ¶¶ 1-16, and 26-42) relate to the legal analysis set forth by the court. Further, it should be noted that the court has assumed without deciding for the purposes of this Order that Brown and King were "final decisionmakers" within the meaning of *Monell* and its progeny.
(Cont'd)

court will also defer ruling on Brown and King's assertions of qualified immunity until the factual discussion required by this Order is given.

C. Plaintiff's State Law Claims Against the County Defendants

Plaintiff has sued the County defendants for intentional infliction of emotional distress; negligent hiring, retention and supervision; and punitive damages. Plaintiff also apparently sues the County for the assault and battery of plaintiff at the hands of Bryant. The claims against the County and individual defendants in their official capacities implicate the interposed defense of sovereign immunity, to which the court now turns.

In its Order of May 17, 1993, the court denied the County defendants' motion to dismiss based upon the defense of sovereign immunity on the ground that nothing in the record indicated whether the County carried liability insurance for plaintiff's pre-1991 claims (the only claims remaining under consideration), which insurance would have served to waive sovereign immunity for those claims. *See Kelleher v. State,* 187 Ga. App. 64, 369 S.E. 2d 341, 342 (1988) (discussing the effect of sovereign immunity under Georgia law); *Georgia Dep't Human Resources v. Poss,* 263 Ga. 347, 434 S.E. 2d 488, 489 (1993) (same). The court's May 17, 1993, Order might have been misleading to the extent that it may have implied that the

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(Cont'd)

This may or may not be the case, and should be addressed in the supplemental briefs. Finally, the parties should address the question of supervisory liability under section 1983 even if Brown and/or King are not final decisionmakers, or explain why the supervisory liability standards do not apply to non-final decisionmakers.

County was under a duty to *prove* the non-existence of liability insurance. To the contrary, under Georgia law, "[s]overeign immunity is not an affirmative defense . . . that must be established by the party seeking its protection. Instead, immunity from suit is a privilege that is subject to waiver by the State, and the waiver must be established by the party seeking to benefit by the waiver." *Poss*, 434 S.E. 2d at 489. The question is whether plaintiff has met her burden of showing that the County maintained liability insurance that covers her claims.

It is undisputed that the County only maintained liability insurance between 1982 and 1985. The only state-law claims that could possibly fall within the scope of this coverage are those pertaining to negligent hiring, retention, and supervision. Thus, the County is immune from suit as to all other state-law claims asserted by plaintiff.

The record discloses some evidence to support the claims of negligent hiring, retention, and supervision, which need not be discussed at this point. The problem is that the issue of sovereign immunity remains unclarified. The parties were pursuing a declaratory judgment action in state court for the purposes of determining whether the liability insurance policies in effect between 1982 and 1985 cover these claims. That case was settled, however, and the parties have not adequately informed the court as to the effect of that settlement. Thus, more briefing on this issue is required as well.[9]

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9. The defense of sovereign immunity is not one that can be waived. Therefore, it cannot be "settled out" of the case. The court recognizes, of course, that the County defendants may have determined, prior to a final judgment in state court, that its arguments were without merit and therefore settled the case. If that is indeed the case, even though the court will entertain the odd spectacle of having the County defendants argue *against* the assertion

(Cont'd)

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D. Plaintiff's Remaining Claims Against Defendant Bryant

As the court has noted, there is a genuine issue of fact as to whether Bryant raped plaintiff.[10] The other claims against Bryant are similarly in issue. The only matters the court will address at this point are any legal arguments Bryant raises in defense of plaintiff's claims.

The only legal argument not addressed in the body of this Order or in previous Orders concerns plaintiff's ability to bring a separate cause of action for the civil tort of rape. The issue, however, is one of form rather than substance. It is not, and cannot be, seriously disputed that the law recognizes an action sounding in civil tort where the act complained of is rape. The

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(Cont'd)
of sovereign immunity, the law needs to be determined at this level. Accordingly, despite the apparent settlement, defendants and plaintiff must still brief this court on the applicability *vel non* of the policies in effect in 1982 through 1985. This discussion should address: (1) the terms of the policies, (2) the accrual dates of plaintiff's hiring, retention, and supervision claims (which are all distinct), and (3) any statute of limitations issues (apart from the accrual dates of claims within the policy language) the accrual dates of these claims may involve.

The court will also forego, for the moment, discussion of the official capacity immunity defenses asserted by defendants. The parties are encouraged, but not required by this Order, to flesh out the issues relating to this defense more fully than previously done in their initial briefs.

10. If plaintiff's version of the facts is accepted by the jury, there is no question that Bryant's actions violated clearly established law, and that Bryant is not entitled to qualified immunity or official immunity, his protestations to the contrary notwithstanding.

question is whether a separate label (the "tort of rape") can be attached to the claim aside from battery or other personal injury. Whatever the answer to this question, it matters little at this juncture. Plaintiff also alleges battery, and plaintiff is not entitled to a double recovery. Thus, she has not forfeited her claim by inartful pleading, and Bryant is not prejudiced by the inclusion of that claim in plaintiff's amended complaint. For lack of clear direction in the law, the court cannot say that Bryant sustained his burden by showing his entitlement to summary judgment on count 2 of plaintiff's complaint.

Conclusion

Accordingly, plaintiffs' motion to alter or amend judgment [#128-1] is GRANTED in PART and DENIED in PART. This court's Order of September 26, 1994, is hereby VACATED in PART with respect to the court's determination that plaintiff Almand's state-law and constitutional claims are time-barred. The Clerk is DIRECTED to AMEND the judgment [#126] to reflect the entry of judgment against plaintiff JoAnn Warren **ONLY**. Defendants DeKalb County, Director Thomas E. Brown, Detective Dale Holmes, and Captain A.R. King's motion for summary judgment [#96-1] is hereby REVIVED as to plaintiff Almand only, and is GRANTED in PART and DEFERRED in PART. Defendant Floyd r. Bryant's motion for summary judgment [#98-1] is hereby REVIVED as to plaintiff Almand only and DENIED. Within 30 days of the filing of the instant Order, the County defendants are DIRECTED to file their supplemental brief with the court as required in the body of the instant Order. Plaintiff Almand shall have 15 days thereafter to file her response, if any, thereto. There shall be no reply brief as of right. The Clerk is DIRECTED to RESUBMIT this action 45 days from the filing of the instant Order.[11]

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11. The parties are on notice that settlement is favored by this court in all cases.

Appendix B

SO ORDERED, this 30 day of May, 1995

s/ Richard C. Freeman
RICHARD C. FREEMAN
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MAY 7, 1997

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-8866

MARY ELIZABETH ALMAND, JOANN WARREN,

Plaintiffs-Appellees,

versus

DEKALB COUNTY, GEORGIA and DEKALB COUNTY DEPARTMENT OF PUBLIC SAFETY, et al.,

Defendants-Appellees,

FLOYD BRYANT, Detective in his individual and official capacity,

Defendant-Appellant.

On Appeal from the United States District Court for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, __F.2d __).

Before: EDMONDSON, Circuit Judge, FAY, Senior Circuit Judge, and ALDRICH*, Senior District Judge.

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* Honorable Ann Aldrich, Senior U.S. District Judge for the Northern District of Ohio, sitting by designation.

Appendix C

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ J.L. Edmondson
UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

(2)

No. 97-231

In The

Supreme Court of the United States

October Term, 1997

MARY ALMAND,

Petitioner,

vs.

DEKALB COUNTY, GEORGIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented by Petitioner are as follows:

1. Must a court's determination of whether an action was taken under color of state law be made in light of the totality of the circumstances.

2. Is the question of whether an action was taken under color of state law always a pure question of law or can it be a mixed question of law and fact.

3. Whether a defendant's admission in his answer that he acted under color of state law is binding.

Respondent Floyd Bryant[1] contends that this case is not a proper one for a grant of certiorari. In the event the Court does grant the Petition, Respondent contends that the only issues that ought to be addressed are the second and third ones presented by Petitioner. With regard to question one, it is clear upon a careful reading of the Eleventh Circuit's opinion in this case that they did consider the "totality of the circumstances" and simply drew a conclusion contrary to the position of the Petitioner. Therefore, that question is not a proper one for a writ of certiorari.

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[1] Although DeKalb County, Georgia is shown in the style of this case, Floyd Bryant was the only Appellant below and is the only Respondent in this Court.

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OPINIONS AND JUDGMENT BELOW

Petitioner attached to the Petition the opinions and judgment from below. The opinion of the United States Court of Appeals for the Eleventh Circuit dated January 24, 1997, reported at 103 F.3d 1510 (11th Cir. 1997); the Order of the United States District Court for the Northern District of Georgia, Atlanta Division filed May 30, 1995; and the Per Curiam Opinion of the United States Court of Appeals for the Eleventh Circuit Denying Petition For Rehearing Filed May 7, 1997 are attached to the Petition as Appendices A, B and C respectively. Respondent has not made these exhibits to this Response.

STATEMENT OF JURISDICTION

Respondent agrees that the jurisdiction of this Court would be proper under 28 U.S.C § 1254(1) but denies that this is a proper case for a grant of a writ of certiorari.

STATUTE INVOLVED

Respondent agrees that this case involves the application of 42 U.S.C. § 1983.

STATEMENT OF THE CASE

With one glaring, and perhaps dispositive, exception, Petitioner's factual statement is drawn substantially, and in parts verbatim, from the facts set forth by the Court of

Appeals. Moreover, in her Suggestion Of En Banc Hearing And Petition For Rehearing By Plaintiff-Appellee-Petitioner, Petitioner's Statement of Facts consisted solely of the following: "The facts of this appeal are simple and correctly stated in the panel's opinion at slip op., pp. 736-738."

The change Petitioner seeks to make in the facts she presents to this Court appears at the end of the third paragraph on page 3 of the Petition. Petitioner states:

> [B]ryant initially went out the door, but before Almand could retrieve the key and relock the door Bryant reentered the apartment. Upon reentering the apartment, Bryant struggled with and raped Almand.

Petition, p. 3.

However, the pertinent facts established by the record, set forth by Petitioner in the briefs below, and stated by the Court of Appeals, which restatement was adopted by Petitioner in seeking an en banc rehearing, are as follows:

> [A]lmand asked Bryant to leave; and although he declined at first, he eventually agreed to leave. Bryant went out the door, and Almand closed it behind him.
>
> From outside, Bryant then forced open the closed door with such shock that the wood broke off the door. Having pushed open the door, Bryant reentered Almand's apartment, physically struggled with her and forcibly raped her. No report was made to the police at the time.

> A few days later, Almand was arrested for drug trafficking . . .

Petition, p. 4a. During her deposition Petitioner affirmed that the door was completely closed.

Petitioner, as she is entitled to do on a Motion for Summary Judgment, related her version of the incident in a manner which shows Respondent to be the perpetrator of a vicious attack. Now that the Court of Appeals has held that the legal effect of her very facts is that the allegedly wrongful act of Respondent against Petitioner was not under color of law, Petitioner attempts to recast the facts before this Court.

Petitioner notes that the Court of Appeals' opinion was a "split decision" but fails to note that the dispositive issue for a dissenting senior district judge sitting by designation was that the door, although "fully closed," was not locked. *Compare* Petition, p. 10a *with* Petition, p. 15a. The facts as cast by Petitioner and accepted by the Court of Appeals and then adopted by the Petitioner in her request for en banc rehearing, state that Respondent broke through a closed door. Whether the door in addition to being closed was locked makes no difference to the Court of Appeals' holding.

REASONS WHY THE PETITION SHOULD NOT BE GRANTED

Petitioner has failed to cite any authority from this Court that the Court of Appeals ignored or misapplied,

has failed to identify a true conflict among or between the circuits,[2] and has failed to articulate an important federal question requiring this Court's attention. Therefore, Petitioner has failed to demonstrate why the Court should grant a writ of certiorari in this case. Sup. Ct. R. 10(a), (c).

As noted above, Petitioner is seeking certiorari based upon a different set of facts in the hope of getting a different result. She is attempting to argue the case again after recasting the facts which were considered by the Court below.

ARGUMENT

I.

THE COURT OF APPEALS DID CONSIDER THE TOTALITY OF THE CIRCUMSTANCES IN CONCLUDING THAT THE RESPONDENT'S ALLEGED ACTIONS WERE NOT TAKEN UNDER COLOR OF STATE LAW.

A person acts under color of state law when he acts with authority possessed by virtue of his employment with the state. *Edwards v. Wallace Community College*, 49 F.3d 1517, 1522 (11th Cir. 1995) (citing *West v. Atkins*, 487 U.S. 42, 48-50, 108 S.Ct 2250, 2255, 101 L.Ed.2d 40 (1988)). However, not all acts by state employees are acts under color of law. *Id.* at 1523. "The dispositive issue is whether the official was acting pursuant to the power he/she possessed by state authority or acting only as a private

[2] Merely pointing to cases from other circuits which reach different results on different facts does not identify a circuit conflict.

individual." *Id.* (citing *Monroe v. Pape*, 365 U.S. 167, 183-84, 81 S.Ct. 473, 482, 5 L.Ed.2d 492 (1961), *overruled on other grounds by, Monell v. Department of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

Whether conduct constitutes state action is no simple question of fact. *See Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S.Ct. 2777, 2782, 73 L.Ed.2d 534 (1982) (describing the question of whether there is state action as question of law); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6, 100 S.Ct. 1708, 1715 n.6, 64 L.Ed.2d 333 (1980) (determining if state action exists is resolution of question of law); *see also, Duke v. Smith*, 13 F.3d 388, 392 (11th Cir. 1994) (reviewing *de novo*, as a mixed question of law and fact, district court's determination that private actor was not sufficiently intertwined with governmental entity to be engaged in state action).

Petitioner argues that the Court of Appeals "erred in attempting to establish a bright line test for determining when action is taken under color of state law." Petition, p. 6. Petitioner's characterization of the Court of Appeals' holding is misleading at best. The opinion of the Court of Appeals contains over two pages of facts, and in its discussion of its holding, the Court discusses the facts again for more than a page.[3] In addition, the Court noted

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[3] Once again the facts found by the Court of Appeals were those urged upon the Court of Appeals by the Appellee/Petitioner. The Court of Appeals, as required, considered the facts in the manner most favorable to the non-movant Plaintiff/Appellee/Petitioner. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254-55, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986). Plainly stated, the "new" totality of the circumstances Petitioner asks

facts that were not material and those that, if different, would change the result. Petition, pp. 2a-4a, 9a-11a, & nn.9-11. Clearly, the Court of Appeals considered the totality of the circumstances in reaching its result.

Petitioner misstates the Court's holding in stating that the Court of Appeals developed a "bright line test." To the contrary, the Court merely stated that in reaching its conclusion, the Court is required "to engage in line drawing." Such language is common when addressing legal questions even if the standard is one of totality of the circumstances. *See, e.g., Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538-39 (11th Cir. 1997) (noting that standard in hostile work environment case is "totality of the circumstances" but discussing where "to draw the line"); *United States v. Saintil*, 753 F.3d 984-989 (11th Cir. 1985) (holding "[w]hile it sometimes difficult to draw lines as to the admissibility of evidence under Rule 403, we cannot say it was an abuse of discretion, under the totality of the circumstances presented here, to admit this evidence for the purpose of proving control over the vessel."); *Elliott by and through Elliott v. United States*, 13 F.3d 1555 (11th Cir. 1994) (addressing the doctrine of *Feres v. United States*, 340 U.S. 135 (1950)).

Moreover, typically when a court establishes a "bright line" test, it refers to it as such. Importantly, the words "bright line" are the language of the Petitioner, and those words are absent from the Court of Appeals'

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this Court to consider are circumstances other than those she urged upon each court below, in the hope of obtaining a different result.

opinion in this case. Finally, in restating its holding, the Court wrote:

> [I]n the *circumstances* of this case, we draw the line at the front door of Almand's apartment. When Bryant, by physical force, broke into Almand's residence, he was not then gaining entry by virtue of any authority he might have been given by the state to act as a police officer.

Petition p. 11a (emphasis supplied). The emphasized word makes clear that the Court of Appeals considered the totality of the circumstances, and then drew a line – or in other words, a conclusion. The Court of Appeals was not articulating a new "bright line" test.

Without additional discussion of the appropriate standard, Petitioner puts forth cases from other circuits which she asserts require a different result in this case. The cases relied upon by Petitioner are distinguishable from the instant case. As noted previously, for the Court of Appeals below, the critical factor seemed to be that Respondent allegedly came through Petitioner's door by brute force rather than by virtue of his office of police officer. Even the dissenting Senior District Judge wrote:

> [T]he majority holds that once Bryant left and then "forcibly" broke in, he was no different than "any other ruffian." If Bryant had broken through a *locked* door, I might accept this conclusion.

Petitioner, p. 15a (emphasis supplied).

Petitioner relies on *Dang Vang v. Vang Xiong X. Toyed*, 944 F.2d 476 (9th Cir. 1991). This case is readily distinguishable from the case at bar. The accused official in *Dang Vang* consistently took advantage of the victims by virtue of the trust they placed in him as an officer of the state. There was no indication that he ever gained access to them or put them in the position to assault them by brute force. Certainly there is no indication that he ever broke through a closed door to get to one of them, after having been completely excluded from their apartment.

The next case relied upon by Petitioner is *Doe v. Rains County Independent School District*, 76 F.3d 666 (5th Cir. 1995). In *Doe*, unlike in this case, the teacher had an ongoing sexual relationship with the student which had arisen, at least in part, during school hours. Again, *Doe* lacks any indication that the alleged state officer ever stepped outside his position as a teacher to gain access to the alleged victim. The critical distinction for the Court of Appeals' opinion below is that Respondent obtained access to Petitioner by breaking through a closed door, and not by seducing her while otherwise engaged in police work.

The final case relied upon by Petitioner, *Bennett v. Pippin*, 74 F.3d 578 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 68 (1996), illustrates the importance of Petitioner's attempted recharacterization of the facts of this case. In that case, the Sheriff apparently gained access to the victim by walking into her house after offering to stay on her porch to stand guard. Petitioner argues that *Bennett* is similar to this case because the Sheriff apparently

"entered the victim's home without her consent." Petitioner then argues that the Court of Appeals was "misguided" in placing emphasis on the "lone fact" that Respondent reentered Petitioner's apartment by force.

Again Petitioner misreads the Court of Appeals' opinion. In its discussion of this issue, the Court of Appeals stresses the fact that Respondent made advances towards Petitioner and she demanded that he leave and that he complied with that request. The Court then notes that Almand had fully closed the door, thus excluding Respondent from her apartment. Respondent then allegedly burst in the front door, and at that point committed the sexual assault. Therefore, the Court of Appeals was relying not on the force alone, but on the fact of the forcible reentry after Petitioner had fully excluded him from her apartment. Importantly, the dissenting Judge would have agreed with the majority's analysis if the door had been locked.

Petitioner's attempted reliance on the dissenting opinion shows a misunderstanding of this Court's purpose. Essentially, Petitioner requests that this Court grant certiorari and send this case back for the purpose of determining whether or not the unlocked door is critical. Petitioner wanted to characterize Respondent's actions as violently as possible, and in so doing, rendered the fact of whether or not the door was locked ultimately immaterial to the Court of Appeals' analysis.

II.

THE ISSUE OF WHETHER AN ACTION WAS TAKEN UNDER COLOR OF STATE LAW IS A QUESTION OF LAW, OR IN THE ALTERNATIVE, EVEN IF IT IS A MIXED QUESTION OF LAW AND FACT, IT IS ONE THAT IS PROPER FOR THE COURT TO RESOLVE.

Put simply, statements from this Court indicate that the color of law question is a question of law for the Court's determination. *Blum v. Yaretsky*, 457 U.S. 991, 996-98, 102 S.Ct. 2777, 2782, 73 L.Ed.2d 534 (1982); *Cuyler v. Sullivan*, 446 U.S. 335, 342 n.6, 100 S.Ct. 1708, 1715 n.6, 64 L.Ed.2d 333 (1980).

Moreover, even if the color of law issue is a mixed question of law and fact, it is a question like probable cause, or arguable probable cause, which are proper for a court to determine. Importantly, the Court of Appeals made its determination based upon the facts as presented by the Petitioner. Petitioner has not pointed to any factual dispute which would change the Court of Appeals' holding. As noted above, Petitioner simply does not like the result the Court of Appeals reached. As a result, this case as presented by Petitioner, is not a proper one for the grant of a writ of certiorari. United States Supreme Court Rule 10 concludes:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Finally, Petitioner argues that the Court of Appeals below ignored its own case law. *See Duke v. Smith*, 13 F.3d 388 (11th Cir. 1994). In *Duke*, the Court reviewed a district court finding regarding state action "*de novo* because the

issue of state action is a mixed question of law and fact." *Id.* at 392.

Importantly, the United States Supreme Court does not exist to correct a Court of Appeals' application of its own precedent. Moreover, in *Duke*, the Court of Appeals reviewed the color of law question *de novo*, and not for clear error. This indicates that the issue is one for the court as an expounder of the law, and not as a fact finder, to resolve. Clearly, as illustrated by its lengthy discussion of the facts, the Court of Appeals below correctly resolved the color of law issue in light of the facts presented.

III.

RESPONDENT'S STATEMENT IN HIS ANSWER THAT HE WAS "A POLICE OFFICER WHOSE CONDUCT DESCRIBED HEREIN WAS TAKEN UNDER COLOR OF STATE LAW" IS NOT DISPOSITIVE OF THE COLOR OF LAW ISSUE.

Respondent in his answer stated "this Defendant admits the allegations" of a paragraph of the Complaint which read:

> Defendant, FLOYD RICHARD BRYANT, was at all times herein a law enforcement officer certified by the State of Georgia and employed by the County of DeKalb, Georgia, as a police officer whose conduct described herein was taken under color of law.

Petitioner argues that Federal Rule of Civil Procedure 8(b) mandates that Respondent's answer to this allegation is dispositive of the color of law issue. In presenting this

issue to this Court, Petitioner departs even further from the purposes for which certiorari is ordinarily granted. Petitioner does not even argue that this simple rule of pleading governing procedure in the district courts presents an "important federal question"; that the Court of Appeals' decision departed from the accepted and usual course of judicial proceedings calling for an exercise of this Court's supervisory power; that the meaning of Civil Procedure Rule 8 is an important question of federal law requiring interpretation by this Court; or that it is an important federal question decided in a way conflicting with previous decisions of this Court.

More importantly, Petitioner again ignores the analysis of the Court of Appeals. The Court of Appeals, in reaching its decision, noted that in the context of all of the pleadings, it was clear that Respondent was denying that he had taken any wrongful action under color of law. Respondent specifically denied that he was even present at Petitioner's residence on the pertinent date; that he broke her door; or that he raped her. Respondent also stated in his answer that the Complaint did not state a cause of action under federal law. In the end, the Court of Appeals concluded that, construed in its totality, Respondent's answer meant that the actions he admitted to taking were taken under color of state law, but that the relevant allegations regarding his wrongful conduct were not taken under color of state law. Petition, p. 9a. Finally, the Court of Appeals noted that in support of his Motion for Summary Judgment, Respondent stated that "no action by him was taken under color of state law, for purposes of § 1983 liability."

Petitioner is forced to rely on "substantial justice" and Federal Rule of Civil Procedure 8(f) to argue that this Court should grant the writ of certiorari and hold (given the purposes for which this Court accepts a case) that each time a defendant in any district court in this country admits a general allegation and only denies the wrongful conduct which would give rise to such a § 1983 liability, such defendant must be bound by such an "admission." Respondent suggests that not only is this an improper issue upon which to grant a writ of certiorari, a decision in Petitioner's favor would create numerous problems and complicate the pleading process in the district courts. *See* Fed. R. Civ. P. 1.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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